IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RONALD J. SREIN and R.J.SREIN CORP.	:	CIVIL ACTION
	:	
vs.	:	
	:	
FRANKFORD TRUST COMPANY (NOW KNOWN AS KEY TRUST COMPANY	:	NO. 99-2652
	:	

MEMORANDUM

ROBERT F. KELLY, Sr. J. **MARCH 25, 2004**

FACTUAL BACKGROUND

During the 1980's Ronald J. Srein created the R.J. Srein Corp. ("Srein Corp.") of which he is the sole stockholder and employee. Through Srein Corp. Mr. Srein set up an ERISA-governed profit sharing plan called the R.J. Srein Corp. Profit Sharing Plan (the "ERISA Plan").

Beginning in 1990, Srein began exploring investment possibilities in viatical participation agreements through a broker, Craig Silverman, and Silverman's company FINDCO, Inc. ("FINDCO").[1] During 1992 and early 1993, Srein invested over three hundred thousand dollars ($300,000) of his personal funds in six participation agreements as private investments. It is undisputed that these investments (the "non-ERISA investments") were not made by or on behalf of the Srein Corp. ERISA Plan. In February of 1993, the Srein Corp. retained the Frankford Trust Company ("Frankford") as Trustee of the ERISA Plan. The ERISA Plan documents identify Srein as "Trustee" "Plan Fiduciary" and "Plan Administrator". In June of 1993 FINDCO, Frankford and the Plan entered into a participation agreement for a 100% interest

[1] See Findings of Fact Nos.3 and 4 for an explanation of a viatical participation agreement.

in a life insurance policy on the life of J. Lloyd Madsen (the "Madsen Policy"). Srein, not Frankford, found or identified this investment and made the decision that the Plan should invest.

Because the Madsen Policy was not a registered security, Frankford assigned the participation agreement a random control number and placed it in its vault for safekeeping. It should be noted that Frankford retained a copy of the participation agreement, it did not retain the actual life insurance policy. It was later discovered that Silverman was committing fraud both as to the ERISA Plan and Srein's non-ERISA investments by selling additional participation agreements in the same life insurance policies to other investors. As a result, after each viator died the policy proceeds were paid to the most recent purchaser, and Srein recovered nothing on either his personal investments or those made through the ERISA Plan.

In this lawsuit Plaintiffs seek to recover their lost investments through an ERISA action for breach of fiduciary duty. Plaintiffs are not seeking relief solely for the alleged losses to the ERISA Plan assets, instead, they ask this Court to expand their claim and to award them consequential damages allegedly resulting from losses under the non-ERISA investments.

PROCEDURAL BACKGROUND

This action was commenced in May of 1999. Because it involved a negligence count as well as an ERISA count it was tried both as a bench and jury trial in July of 2001 resulting in a defense verdict on both counts. The case was thereafter remanded following appeal in March of 2003. Plaintiffs now concede that their negligence claim has been properly dismissed on the basis of preemption and therefore the only matter left for consideration is the ERISA-based count.

A non-jury trial date was set for February 25, 2004. At that time the parties agreed that no additional testimony was needed and that the Court could decide the case on the record as it stood. At that time also, the parties, argued the merits of the case, submitted suggested Findings of Fact, Conclusions of Law and Briefs.

The Third Circuit affirmed this Court's holding that defendant was not a fiduciary with regard to the Chamness Participation Agreement, but held that Frankford Trust was a fiduciary as to the Madsen investment.[2] All that remains for this Court to determine, is whether the defendant breached its fiduciary duty to the R.J. Srein Corp. ERISA Plan (the "Plan") with regard to the Madsen Participation Agreement and, if so, what damages are recoverable under ERISA for such breach.

FINDINGS OF FACT

1. Ronald J. Srein is a college graduate, a successful businessman and a sophisticated investor.

2. Ronald J. Srein formed the R.J. Srein Corp. in the mid 1980's. He is its only employee and the sole stockholder. Neither Ronald J. Srein nor R.J. Srein Corp. had any business dealings with Defendant Frankford prior to January or February 1993.

3. In the early 1990's, Mr. Srein was introduced to viatical investments. These are made through a viatical settlement company, which locates individuals diagnosed with potentially terminal diseases. These individuals can obtain an immediate payment of part of the face value of their insurance policy in exchange for assigning all or part of the life insurance policy. This enables the insured to obtain money which would otherwise be unavailable to him until after his death. When the insured passes away, the viatical settlement company collects the policy

[2]See Findings of Fact Nos. 12 and 13.

proceeds, pays the investor the money he advanced under the agreement and the balance is divided between the investor and the settlement company in accordance with their agreement.

4. In the early 1990's, Mr. Srein invested in numerous participation agreements on life insurance policies through American Life Resources Corporation ("ALRC"), a viatical settlement company. A "participation agreement" is a contractual document between an investor (the "participant") and the viatical settlement company, the subject of which is an existing individual life insurance policy.

5. Mr. Srein knew that the principals of ALRC were Steve Simon and Craig Silverman. Mr. Silverman was Mr. Srein's main contact at ALRC. All of Mr. Srein's investments through ALRC matured, that is, the insured passed away, and Mr. Srein received the life insurance policy proceeds, or the contract was repurchased. Mr. Srein was satisfied with all of those investments and the return that he received. No representative of Frankford played any role in Srein's decision to invest in these investments.

6. The procedure followed with ALRC required payments for the investments to be made to an escrow agent. Death benefits were to be paid by the insurance companies through that escrow agent. The escrow agent would then distribute to the investor and the viatical settlement company the difference between the onetime lump payment and the death benefit in accordance with the agreement. In 1992, Craig Silverman parted ways with Steve Simon to form his own viatical settlement company called FINDCO, Inc. ALRC was eventually sold to an entity with which Mr. Srein was not familiar. Therefore, Mr. Srein continued to deal with Mr. Silverman and transferred his business to the new entity FINDCO. In September and October of 1992 and April of 1993, Mr. Srein <u>individually</u> entered into six (6) participation agreements with

FINDCO. The procedures followed by FINDCO were the same as those that had been used by ALRC. As a matter of fact, the same forms were used and FINDCO used Mr. Neil Katims, the same escrow agent used by ALRC. No representative of Frankford Trust played any part in Mr. Srein's decision to invest in these six (6) participation agreements.

8. In early 1993, the R.J. Srein Corporation, of which Mr. Srein is the only employee, wanted to invest some of the funds in its retirement plans in participation agreements with FINDCO. The Trustee of the Srein Plans at the time, Eagle Retirement and Investment Planning, would not allow such investments by retirement plans on which it was trustee because such investments were not registered. Craig Silverman recommended that Mr. Srein contact Laraine Daly, a trust officer at the Frankford Trust Company, to see if they would act as trustee on accounts investing in participation agreements through FINDCO.

9. Neither Mr. Srein nor R.J. Srein Corporation had any business dealings with Frankford Trust prior to January or February of 1993. Mr. Silverman, on the other hand, did have a relationship with Frankford Trust that dated back at least three years. Mr. Silverman had been introduced to the Frankford Trust by his attorneys, Mesirov, Gelman, Jaffe and Jamieson.

10. Laraine Daly contacted Mr. Srein and facilitated setting up qualified ERISA plans for R.J. Srein Corp. at Frankford Trust and transferring assets from Eagle Retirement to Frankford Trust. Laraine Daly understood that Mr. Srein was moving the R.J. Srein Corp. Plans to Frankford Trust for the purpose of, among other things, investing in participation agreements on viatical settlement contracts. On February 11, 1993, R. J. Srein Corp. and the Bank entered into two separate retirement plan agreements: an "Adoption Agreement" relating to a Money Purchase Pension Plan, and an "Adoption Agreement" relating to a Profit Sharing Plan. See

Exhibits D-52 and D-53 respectively. These Adoption Agreements reflect certain selections between available alternatives (with respect to, among other things, investing and the exercise of investment discretion). The Bank exercised no investment discretion according to the Plan Documents; its role is of a limited nature.

11. Frankford Trust did not have any rules against non-registered investments, such as participation agreements in viatical settlement contracts, being held in investment plans for which it acted as trustee. Mr. Srein selected the investments for the plans. Frankford Trust retained the authority to refuse to accept investments which would violate the provisions of ERISA.

12. Prior to the transfer of the Plans to Frankford Trust in February of 1993, Mr. Srein was anticipating that the R.J. Srein Corp. Money Purchase Plan would enter into a participation agreement to purchase an existing life insurance policy on Errol Chamness. It was for this reason that Mr. Srein moved the R.J. Srein Corp. Plans to Frankford Trust, for the purpose of, among other things, investing in participation agreements on viatical settlement contracts. At Mr. Srein’s request, once Laraine Daly had prepared the necessary documentation and money was transferred from Eagle Retirement to Frankford Trust, Ms. Daly wired the funds from the Plan to facilitate the purchase of the Chamness Policy. No representative of Frankford Trust played any role in the negotiations by and between R.J. Srein Corp. and FINDCO and/or between FINDCO and Mr. Chamness relating to the underlying terms of the investment.

13. On February 17, 1993, two weeks after selling a 100% interest in the Chamness Policy to R.J. Srein Corp., FINDCO and Silverman purported to sell the same policy to another investor.

14. Then, on June 3, 1993, Frankford Trust, as trustee for the R.J. Srein Corp. Profit Sharing Plan, and the R.J. Srein Profit Sharing Plan, entered into a participation agreement with FINDCO to purchase 100% of American National Insurance Company Policy No. 828758 on the life of Lloyd Madsen ("Madsen Policy"). Laraine Daly signed the participation agreement on the Madsen Policy for Frankford Trust as trustee for R.J. Srein Corp. Profit Sharing Plan. Ronald J. Srein signed the participation agreement on behalf of the R.J. Srein Corp. Profit Sharing Plan. In order to fund the transaction, Frankford Trust executed the checks for the purchase of the Madsen Participation Agreement (one such check was to a non-escrow agent entity). No representative of Frankford Trust played any role in the negotiations by and between R.J. Srein Corp. and FINDCO and/or between FINDCO and Mr. Madsen relating to the underlying terms of the investment.

15. Because the participation agreements were not registered investments, they did not have pre-existing numbers assigned to them. Frankford Trust assigned the participation agreements held in the Plans, including the agreements on the Madsen and Chamness policies, arbitrary, random numbers.

16. On October 28, 1994, Frankford Trust entered into a participation agreement on behalf of Stephen Matt Richards to purchase 28% of the Madsen Policy (American National Life Policy No. 828758), the same underlying Madsen Policy that was the subject of the participation agreement in the R.J. Srein Corp. Profit Sharing Plan. Laraine Daly was a signatory on behalf of Frankford Trust as trustee for the Richards Plan. Thus, Laraine Daly was the trust officer both for the Srein Plan and the Richard Plan, and she signed on behalf of each to purchase two participation agreements based on the same insurance policy. Since the Srein Plans had purchased a 100% interest in the Madsen Policy 16 ½ months earlier, there was obviously no percentage left in the

Madsen policy for anyone else to legitimately invest in. Frankford had in its possession, the participation agreement in the Madsen Policy on behalf of the Srein Plan and the participation agreement in the same Madsen Policy, on behalf of the Richards Plan. Because of the 16 ½ month separation between the two purchases of the same policy, neither Laraine Daley nor the Frankford Trust recognized the overlap in the two transactions or that both participation agreements were based on the same policy. Because of this, neither notified Mr. Srein.

17. Although FINDCO had double sold all of the policies in which the Plans and Mr. Srein, individually had invested (subsequent to the successful investment with ALRC), the proceeds of certain of those policies had not been paid out to the second investors, to whom the double sale had been made, until points in time after October 1994.

18. On May 29, 1995, J. Lloyd Madsen died. FINDCO did not notify Mr. Srein or R.J. Srein Corp. that Mr. Madsen had died.

19. On June 26, 1995, Craig Silverman sent to Frankford Trust a check in the amount of $27,499.86, identified as the Richards Plan's percentage of the death benefit of the Madsen Policy. Frankford Trust received the payment of the Madsen Policy proceeds and paid it out to the Richards' Plan. Frankford Trust did not recognize that these proceeds related to the same Madsen Policy, in which the R.J. Srein Corp. Profit Sharing Plan had taken a 100% interest. For this reason, Frankford did not tell Mr. Srein that it had received the Madsen Policy proceeds as payable to the Richard's Plan, did not tell Mr. Srein that Mr. Madsen had died, and did not check to see if Mr. Srein had been paid on the participation agreement on the Madsen Policy.

20. On August 31, 1994, Mr. Chamness, the insured whose policy was the subject of a participation agreement on the R.J. Srein Corp. Money Purchase Plan, died. FINDCO did not

notify Mr. Srein or the R.J. Srein Corp. that Mr. Chamness had died. The proceeds on the Chamness Policy were paid to D.P. Partnership on December 15, 1994.

21. Prior to receiving correspondence from Mr. Srein's lawyer in March of 1998, neither Laraine Daly nor anyone else at Frankford realized that the Madsen Policy had been "double sold."

22. Frankford had no direct contractual relationship with Mr. Srein, individually, other than the relationship with R.J. Srein Corp. (i.e. Mr. Srein maintained no personal account at the Bank).

CONCLUSIONS OF LAW

1. ERISA imposed upon a fiduciary the duty to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 19 U.S.C. § 1104(a)(1)(B).

2. A fiduciary is expected to conduct itself in good faith and in the exercise of such level of ordinary prudence and diligence as a reasonable person would exercise with regard to his business affairs.

3. Ordinary prudence and diligence does not require a trust officer to recognize and remember that a six digit insurance policy number referenced in an exhibit to one contract is identical to a policy number referenced in another exhibit to a similar contract sixteen months later.

4. Ordinary prudence and diligence does not require that a trust officer presume her clients are being defrauded by their business associates

5. Given the lapse of time (approximately sixteen months) between the Srein

Corps.' investment in a participation agreement relating to the Madsen Policy, and the subsequent such investment by Marcomp/Richards, and given that the only proceeds relating the Madsen Policy received by Frankford were specifically designated by Silverman as payable to Marcomp/Richards, and Frankford so deposited them, the Court does not conclude that Frankford committed a breach of its fiduciary duties as to the Madsen Participation Agreement.

6. Frankford and Ms. Daly acted in good faith with regard to the Srein Corp. Plan.

DISCUSSION

Plaintiffs contend that the Defendant Frankford Trust breached its fiduciary duty to the Srein Corp. Plan with respect to the Madsen Participation Agreement.

Defendant denies that its failure to discover Silverman's fraudulent scheme or its failure to recognize the "overlap" of two of its customers interests in an identical underlying life insurance policy - under circumstances where those interests occurred sixteen months apart - raises to the level of a breach of a fiduciary duty.

It was Srein not Frankford who had a history of dealing with Silverman (in September and October 1992 and April of 1993, Mr. Srein individually entered into six participation agreements with FINDCO/Silverman) and who identified and negotiated the terms of each viatical investment. Obviously Srein had a much closer relationship with Silverman than anyone at Frankford.

The transaction with reference to the Madsen Policy was entered into on June 3, 1993. The Richards Participation Agreement was not entered into until October 28, 1994 almost sixteen months later.

The only proceeds of the Madsen Participation Agreement which Frankford ever came into possession of were in the amount of $27,499.86 which arrived by check specifically designated by Silverman/FINDCO as “FBO Marcomp Profit Sharing Plan”.

Frankford Trust called a witness, Rob McGill, who had over sixteen years experience as a Trust Operations Manager. Mr. McGill testified that no Trust Department with which he was familiar would have identified the overlap between the two participation agreements backed by a single insurance policy. His uncontroverted testimony was to the effect that trust systems are designed to track and identify the physical location of assets held by a bank, and that the Frankford system did not fail in this regard. Plaintiffs did not introduce any evidence to refute this or to show a contrary standard of care in the trust industry.

Plaintiffs have failed to prove a breach of Defendant’s fiduciary duty and I therefore enter the following Order.

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FRANKFORD TRUST COMPANY (NOW KNOWN AS KEY TRUST COMPANY	:	NO. 99-2652

O R D E R

AND NOW, this 25th day of March, 2004, judgment is hereby entered in favor of Defendant Frankford Trust Company (now known as Key Trust Company) and against Plaintiffs Ronald J. Srien and R.J. Srein Corp.

BY THE COURT:

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ROBERT F. KELLY, SR. J.